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No. 679

In the Supreme Court of the United States

OCTOBER TERM, 1962

WASHINGTON TOLL BRIDGE AUTHORITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. C1–C7; R. 27–32) is reported at 190 F. Supp. 95. The opinion of the court of appeals (Pet. A1–A14; R. 161–170) is reported at 307 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1962. (R. 171.) A petition for rehearing was denied on September 26, 1962. (R. 203.) The petition for certiorari was filed on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the Washington Toll Bridge Authority, in its operation of the Washington State Ferries during the years in which the federal excise tax was applied to water transportation, liable for the collection of such tax on amounts paid by private users of the ferry service for transportation of persons?

2. Was the court of appeals' refusal to remand for the taking of additional evidence a proper exercise of its discretion?

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 4261. IMPOSITION OF TAX.

(a) [as amended by Sec. 1, Act of July 25, 1956, c. 725, 70 Stat. 644] *Amounts Paid Within the United States.*—There is hereby imposed upon the amount paid within the United States for taxable transportation (as defined in section 4262) of any person by rail, motor vehicle, water, or air a tax equal to 10 percent of the amount so paid.

* * * * *

(d) [as amended by Sec. 4(b), Act of July 25, 1956, *supra*] *By Whom Paid.*—Except as provided in section 4264, the taxes imposed by this section shall be paid by the person making the payment subject to the tax.

(26 U.S.C. 4261.)

SEC. 4264 [as amended by Sec. 4(a), Act of July 25, 1956, *supra*]. SPECIAL RULES.

* * * * * *

(c) *Payment of Tax.*—Where any tax imposed by section 4261 is not paid at the time payment for transportation is made, then, un-

der regulations prescribed by the Secretary or his delegate, to the extent that such tax is not collected under any other provision of this subchapter—

(1) such tax shall be paid by the person paying for the transportation or by the person using the transportation;

* * * * *

(26 U.S.C. Sec. 4264.)

SEC. 4291 [as amended by Sec. 4(c), Act of July 25, 1956, *supra*]. CASES WHERE PERSONS RECEIVING PAYMENT MUST COLLECT TAX.

Except as provided in section 4264(a), every person receiving any payment for facilities or services on which a tax is imposed upon the payor thereof under this chapter shall collect the amount of the tax from the person making such payment. * * *

(26 U.S.C. 4291.)

STATEMENT

The Washington Toll Bridge Authority ("the Authority") is an instrumentality of the State of Washington created by State statute. It exists for the most part as a self-supporting entity with all the rights and liabilities of a common carrier. Since 1951 it has operated an extensive ferry system, the Washington State Ferries, between local and international points, on Puget Sound and its tributaries. (R. 36–37.) The ferry system is necessitated by the geography of the area. It provides a vital link in the State's highway system, carrying passengers and property by water between termini of the State's highways, thereby avoiding circuitous land travel. (R. 37–38.)

The ferry system is an expansion of services formerly provided in part by King County, State of Washington, a municipal corporation and its successor, the King County Ferry District No. 1, and in greater part by the Puget Sound Navigation Company, a private corporation. The ferry properties of both the County and the company were acquired by the Authority. (R. 35-36.)

The ferry system is not a free service. Persons using its facilities for the transportation of persons or property pay tolls or fares which, with profits from concessions, furnish enough revenue to render the system virtually self-supporting.

The United States brought this action in the district court to recover sums owed by the Authority because of its liability for the collection of the federal transportation taxes imposed by Sections 4261, 4264 and 4291, *supra*, pp. 2–3, on amounts paid for the transportation of persons and property by water. (R. 40, 145.) The Authority denied its liability on the ground that the excise taxes were not intended to apply to amounts paid to it, and further on the ground that it enjoyed a constitutional immunity from the duty to collect and remit the taxes. The district court denied recovery. 190 F. Supp. 95. The court of appeals sitting *en banc* reversed in part and affirmed in part. It held that the statute requiring any person engaged in the business of transporting property for hire to collect the tax on amounts paid for such transportation did not by its terms apply to the Authority, because it could not be said to be "in the business." However, the court held that the Authority was liable for the collection of the tax

on amounts paid for the transportation of persons, since the statute did not limit the duty to collect that tax to persons engaged in the business of such transportation, and that the Authority had no constitutional immunity from that duty. (Pet. A1–A14; R. 161–170.)

ARGUMENT

The decision below is correct and there is no conflict among the courts of appeals. The court below did not abuse its discretion in refusing to reopen the case for the taking of further evidence. The case lacks any continuing public importance.

1. The court of appeals' decision denying constitutional immunity to the Authority is grounded in principles long since settled by this Court. The court of appeals reviewed the law and concluded that (Pet. A9–A10):

> * * * it is difficult to understand how the present tax unduly interferes with the State of Washington's function of government. The record is void of any tangible evidence to this effect. The tax involved is made payable by the persons who pay for the transportation while the State's only obligation is to collect the tax. Since the King County case, the States have been forced to accept the role of tax collector for the federal government on numerous occasions, e.g., income and admission taxes. See *Commonwealth of Massachusetts* v. *United States*, 296 F. 2d 336 (1st Cir. 1961). Such collections have not unduly interfered with, or placed a burden upon, the states' function of government. And because the tax is absorbed by the persons using the ferry system, it imposes no undue economic burden upon

> the State of Washington. Any indirect economic consequences incident to such a tax, such as a decrease in the volume of business if the toll is raised or absorption by the State if it is not, are speculative in nature, not "actual or substantial." Here the Authority raised its toll in an amount equal to the tax and there is no claim that this has affected the operation of its ferry system in any manner.

This holding finds its foundation in three similar decisions by this Court. In *Allen* v. *Regents*, 304 U.S. 439, this Court upheld the obligation of the State instrumentality to collect the federal admissions tax on amounts paid for admissions to college football games (304 U.S. at 449–451):

> For present purposes we assume the truth of the following propositions put forward by the respondent: That it is a public instrumentality of the state government carrying out a part of the State's program of public education; that public education is a governmental function; that the holding of athletic contests is an integral part of the program of public education conducted by Georgia; that the means by which the State carries out that program are for determination by the state authorities, and their determination is not subject to review by any branch of the federal Government; that a state activity does not cease to be governmental because it produces some income; that the tax is imposed directly on the state activity and directly burdens that activity; that the burden of collecting the tax is placed immediately on a state agency. The petitioner stoutly combats many of these propositions. We have no oc-

> vasion to pass upon their validity since, even if all are accepted, we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States.
>
> * * * * *
>
> When a State embarks in a business which would normally be taxable, the fact that in so doing it is exercising a governmental power does not render the activity immune from federal taxation.

The approach taken in the above-case was explicitly reaffirmed in *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, upholding the application of the federal admissions tax to admissions fees collected by a State instrumentality for use of a public beach. Thus, the fact that the Authority is a State instrumentality carrying on a governmental function does not dispose of the case. This test has long since been abandoned by the Court. As Mr. Justice Frankfurter, with whom Mr. Justice Rutledge joined, pointed out in *New York* v. *United States*, 326 U.S. 572, 582, 583–584 (which held the State of New York subject to a federal tax imposed on the sale of mineral waters):

> * * * so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. * * *
>
> * * * * *
>
> * * * [We] find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Contrary to the Authority's implication (Pet. 20–21) this view, in fact, received the concurrence of a full majority of the Court. The Chief Justice, in a concurring opinion for himself and three other Justices, stated (326 U.S. at 588–589):

> It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for its taxing power. *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 524. The national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it.[1]

[1] The fact that both opinions specifically rely upon *Ohio* v. *Helvering*, 292 U.S. 360, and indeed, reach a result completely in harmony with it, should put conclusively to rest the Authority's claim that there is required some reconciliation of the two cases. (Pet. 25–27.)

It is thus clear under this Court's precedents that the Authority's acquisition and operation of the property of the Puget Sound Navigation Company did not effect the withdrawal of this enterprise from the federal taxing power. See also *Helvering* v. *Powers*, 293 U.S. 214, 227.

2. The decision below is not in conflict with *United States* v. *State Road Department of Florida*, 255 F. 2d 516 (C.A. 5th), or *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. 2d 920 (C.A. 1st). Neither of these decisions deals directly with the present statute or with facts similar to this case. The *Florida* case held that for the purposes of applying the tax to the transportation of property, the Department of Roads was not "a person engaged in the business of transporting property for hire." 255 F. 2d at 518. The court below accepted this ruling but pointed out that the statute taxing the transportation of persons does not require that the carrying agency be engaged in the business of transportation for hire.[2] The court did—

> not come to the question whether the federal government could constitutionally tax the users of this state-owned ferry * * *.

The case of *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. 2d 920 (C.A. 1st), involves an entirely unrelated statute specifically exempting certain sums from the gross income of otherwise taxable entities.

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[2] Nor is there anything to the Authority's contention (Pet. 22-23) that it is not a "person" required to collect the tax. Under common rules of construction, the State is a "person" within the meaning of a statute such as the present one. See *Sims* v. *United States*, 359 U.S. 108.

3. The court of appeals properly denied the Authority's petition to reopen the case after the *en banc* judgment in order to offer further evidence of the economic incidence of the excise tax. The validity of federal excise taxes on amounts paid by persons using State services or purchasing goods sold by the States does not depend upon the amount of the tax or its impact upon the fluctuating profitableness of the State's operations. The reference in *New York* v. *United States*, 326 U.S. 572, 588, to a tax which unduly interferes with the performance of the State's function of government goes to the qualitative character of the tax, not to its amount or its competitive consequences. Plainly the court did not abuse its discretion in declining to reopen the case. See *Bowerman* v. *Hamner*, 250 U.S. 504, 514; *Korthinos* v. *The Niarchos*, 184 F. 2d 716, 719 (C.A. 4th), certiorari denied, 341 U.S. 905; *McCarthy* v. *Commissioner*, 139 F. 2d 20, 21 (C.A. 7th).

In any event, the proferred evidence was immaterial. The Authority's application was supported by three affidavits (Pet. F7–F21), one each by Darrell Hedges, executive secretary of the Authority (who had previously been presented as the Authority's key witness at trial), R. Gilman Smith, a professional engineer, and Melvin O. Martin, Controller and Fiscal Officer of the Washington State Ferries. According to the Authority, these affidavits purportedly show a connection between rate of the tolls and the financial feasibility of the Authority's operations. Two of these affidavits, those by Messrs. Hedges and

Martin, are actually silent on that subject, reciting nothing more than the generally unsatisfactory financial condition of the operation without even attempting to show a relation between that condition and the application of the present tax. The third contains precisely the kind of economic speculation and conjecture which had led this Court away from reliance upon the economic incidence of the tax as a legal determinative of constitutionality. See *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 581.

The mere collection of a federal tax from the person paying the fee charged for a governmental service is an unsubstantial burden as a matter of law. *Allen* v. *Regents*, 304 U.S. 439, 452; *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, 419–420. Thus, even assuming all the implications sought to be drawn from the Authority's affidavits in fact existed, they would be immaterial to the resolution of this litigation.

4. The case lacks continuing public importance. The tax upon the transportation of property, which, over our objection, was held inapplicable to the Authority, was repealed as of July 31, 1958, by Section 4 of the Tax Rate Extension Act of 1958, P.L. 85–475, 72 Stat. 259. The tax upon the transportation of persons by water was repealed as of November 15, 1962, by Section 5 of the Tax Rate Extension Act of 1962, P.L. 87–508, 76 Stat. 114.[3]

[3] Investigation by both the Internal Revenue Service and the Tax Division of the Department of Justice discloses that no similar cases are now pending.

CONCLUSION

For the reasons stated, no grounds appear for the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted.

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